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ABSTRACT

This document is one of six discussion papers prepared for the Wisconsin Legislative Council's Special Committee on Crimes Against Children. The introduction explains the committee's task of conducting a thorough examination of state laws relating to crimes against children, reviewing major policy issues affecting those laws to determine whether substantive changes are needed in various statutory provisions and reorganizing the laws. Part I of this discussion paper on physical and psychological abuse of children covers the laws relating to abuse of children, part II deals with sexual exploitation, and part III discusses sexual assault. For each of these issues, there is a section explaining current law and a section giving suggestions for statutory revisions. Copies of the statutes covered in the paper, arranged in numerical order, and a copy of ss. 939.50 to 939.52, which prescribe the basic criminal penalty classification system used in the Criminal Code, are appended. (NB)

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CRIMES AGAINST CHILDREN
A. PHYSICAL AND PSYCHOLOGICAL ABUSE

DISCUSSION PAPER 86-1A

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Wisconsin Legislative Council Staff — Madison, Wisconsin

Special Committee on Crimes Against Children — July 17, 1986

DISCUSSION PAPER 86-1A*

CRIMES AGAINST CHILDREN

A. PHYSICAL AND PSYCHOLOGICAL ABUSE

INTRODUCTION

Discussion Paper 86-1A is the first of a series of Discussion Papers that will be prepared for the Legislative Council's Special Committee on Crimes Against Children. The Special Committee is conducting a thorough examination of state laws relating to crimes against children, including:

1. Reviewing major policy issues affecting these laws to determine whether substantive changes are needed in such statutory provisions as abuse of children; sexual assault; child enticement; lewd and lascivious conduct; abduction; incest; abandonment; and others.

2. Reorganizing these laws, to the extent appropriate, so that like provisions are logically grouped; ambiguities and conflicts in the present laws are reconciled; and relevant Supreme Court and Court of Appeals decisions and Attorney General opinions are codified.

The Special Committee review will be based, in part, on a project undertaken, at the request of Senator Barbara Ulichny, by the University of Wisconsin-Madison Law School and Extension. This project resulted in a preliminary draft proposal entitled "Crimes Against Children: A Proposed Chapter of the Wisconsin Statutes" (July 1985), prepared by Attorney Ronni G. Jones, under the supervision of a Law School/Extension faculty advisory committee. The draft proposal (hereafter referred to as the Law School Proposal) suggests certain policy changes in various statutes relating to crimes against children and suggests the creation of a separate chapter of the statutes on crimes against children, organized by "the interest of the child sought to be protected."

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*This Discussion Paper was prepared by Shaun Haas, Senior Staff Attorney, Legislative Council Staff.

For Special Committee discussion purposes, the issues and statutes to be examined will be grouped into the following separate Discussion Papers which will describe the statutes under discussion and summarize suggestions for changes in these statutes:

Discussion Paper 86-1A: Physical and Psychological Abuse: The Paper will cover ss. 940.201, abuse of children; 940.203, sexual exploitation; and 940.225, sexual assault.

Discussion Paper 86-1B: Sexual Morality: The Paper will cover ss. 944.06, incest; 944.12, enticement for immoral purposes; 944.15 fornication; 944.17, sexual gratification; 944.20 and 944.21, lewd behavior; 944.25, exposure to harmful materials; and 944.32, soliciting prostitutes.

Discussion Paper 86-1C: Physical Neglect: The Paper will cover ss. 52.05, abandonment; 52.055, failure to support; 940.27, failure to support (criminal); 940.28, abandonment (criminal); and 940.29, abuse of residents of facilities.

Discussion Paper 86-1D: Interfering With Custody: The Paper will cover ss. 940.32, abduction; 946.71, interference with custody of child; 946.715, interference by parent with parental rights of other parent; and 946.716, unauthorized placement for adoption.

Discussion Paper 86-1E: Contributing to Delinquency of a Minor: The Paper will cover ss. 947.15, contributing to delinquency; 947.08, crime comics; 125.07, serving alcohol beverages to minor; 161.46, distributing drugs to minor; 943.34, receiving stolen property from minor; and 946.46, encouraging probation or parole violation.

Discussion Paper 86-1F: Regulatory Offenses Directed at Children: The Paper will cover ss. 103.06 to 103.86, employment regulations; 118.13, pupil discrimination; 146.01, infant blindness; 151.03, lead poisoning; 175.20, amusement places; 444.09 (4), boxing exhibitions; 940.26, hazing; 942.02, strip search by school employe; 946.63, concealing death of a child; and 943.35, receiving property from a child.

Discussion Paper 86-1A is organized as follows: Part I covers the laws relating to abuse of children; Part II deals with sexual exploitation; Part III discusses sexual assault; and the Appendix contains copies of the statutes covered in the Discussion Paper, arranged in numerical order, plus a copy of ss. 939.50 to 939.52, which prescribe the basic criminal penalty classification system used in the Criminal Code.

PART I

ABUSE OF CHILDREN

A. EXPLANATION OF CURRENT LAW

1. Description of Criminal Child Abuse Statute and Related Statutes

Under the criminal child abuse statute, "whoever tortures a child or subjects a child to cruel maltreatment..." is guilty of a Class E felony (punishable by a fine not to exceed $10,000 or imprisonment not to exceed two years, or both) [s. 940.201, Stats.]. The term "child" is defined in this statute to mean "...a person under 16 years of age."

The key elements of the child abuse crime, "torturing or subjecting a child to cruel maltreatment," are not statutorily defined. However, the statute does specify that these terms include, but are not limited to, "...severe bruising, lacerations, fractured bones, burns, internal injuries or any injury constituting great bodily harm under s. 939.22 (14)" (emphasis added). "Great bodily harm" is statutorily defined for purposes of this crime, and other Criminal Code statutes, to mean:

> ...[B]odily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury [s. 939.22 (14)].

Directly related to the criminal child abuse statute is a statute which authorizes courts to commit a person convicted of child abuse under s. 940.201, Stats., to the Department of Health and Social Services (DHSS) for a presentence social and psychological examination [s. 972.16, Stats.]. The commitment may be for a maximum period of 60 days and the court is required to consider the findings and recommendations of the DHSS in imposing sentence.

Another statute directly related to the criminal child abuse statute is the abused or neglected children reporting law [s. 48.981, Stats.]. Under the abuse and neglect reporting statute, a broad group of persons having professional dealings with children are required to report to the law enforcement agency facts which create a "reasonable cause to suspect that a child seen in the course of professional duties has been abused or neglected." A law enforcement agency, in turn, is required to investigate to determine if the child is in immediate danger and to take necessary action to protect the child. The law enforcement agency is also required

to notify the county child welfare agency or community services board. These agencies are required to investigate the allegations of abuse or neglect and take appropriate action as prescribed under the statute.

Unlike the criminal child abuse statute, the abuse and neglect reporting statute contains a specific definition of "abuse." As defined in the reporting statute, "abuse" includes nonaccidental physical injury; sexual assault or contact in violation of s. 940.225, Stats.; sexual exploitation, a violation of s. 940.203, Stats.; permitting or requiring a child to engage in prostitution, a violation of s. 940.30; and "emotional damage," as statutorily defined.

2. Discussion of Relevant Court Decisions and Other Interpretations of the Law

The absence of specific statutory definitions of the key elements of the crime of child abuse has led to court decisions addressing constitutional issues raised as a result of the use of the somewhat vague terms "torture" and "cruel maltreatment." The Wisconsin Supreme Court also has been called upon to decide whether or not specific intent to cruelly maltreat a child is an element of the crime of child abuse. Court decisions which have clarified the nature of the wrongful conduct covered by the statute and decided the issue of the intent requirement are discussed below.

In State v. Killory, 75. Wis. 2d 400, 243 N.W. 2d 475 (1976), the Wisconsin Supreme Court rejected the argument that the criminal child abuse statute contains constitutionally vague terminology. In particular, the Court upheld the constitutionality of the statute, despite the use of the vague term, "cruel maltreatment."

Legislation enacted in 1977 clarified the meaning of "cruel maltreatment" in the criminal child abuse statute [s. 940.201, Stats.]. This Legislation also created the current comprehensive child abuse and neglect reporting statute [s. 48.981, Stats.]. The 1977 amendment to the criminal child abuse statute added the enumeration of types of physical injuries which may constitute "cruel maltreatment" under the statute. The same listing of types of injuries was inserted by the 1977 legislation into the definition of "abuse" in the child abuse reporting statute to explain the meaning of the term "physical injury."

The effect of the use of identical language in the criminal child abuse statute and the child abuse and neglect reporting statute was at issue in State v. Campbell, 102 Wis. 2d 243, 306 N.W. 2d 272, 277 (Ct. Apps. 1981; review denied by Wisconsin Supreme Court). In reaching the conclusion that the term "cruel maltreatment," as used in the criminal

child abuse statute, includes abuse which does not result in physical injury, the Court of Appeals rejected the argument that the Legislature intended by the 1977 enactment to limit the crime of child abuse to conduct involving some type of physical injury. The essence of this argument was that the Legislature intended to limit the meaning of the term "cruel maltreatment" in the criminal child abuse statute to physical injuries when it added to the criminal child abuse statute the enumeration of physical injuries describing abuse in the new child abuse reporting law. Specifically, the Court held:

> We conclude that the amendment [to the criminal child abuse statute] was intended to ensure that all cases subject to the reporting requirements of sec. 48.981, Stats., would be subject to prosecution under sec. 940.201, Stats. [criminal child abuse], and that it was not intended to restrict the scope of the latter statute. We therefore hold that physical injury is not an element of the crime of cruel maltreatment.

It should be noted that the child abuse reporting statute -- in particular, the definition of "abuse" in that statute -- has been revised and expanded since the Campbell decision. Clearly, however, based on the reasoning of the Court of Appeals in Campbell, the scope of the child abuse and neglect reporting statute, as delineated in the definitions of the key terms "abuse" and "neglect," does not control the scope of the criminal child abuse statute.

Regarding whether intent to "cruelly maltreat a child" is an element of the crime of child abuse under s. 940.201, Stats., the Wisconsin Supreme Court has held that "specific intent is not an element of child abuse..." [State v. Danforth, 129 Wis. 2d 187, 385 N.W. 2d 125 (1986)]. An effect of this holding was to reject the interpretation of the criminal child abuse statute in the Wisconsin Jury Instructions--Criminal, Number 1221 (1982), which construed the term "cruel maltreatment" in the statute to mean "...the intentional infliction of severe physical injury." The Jury Instruction specified that "intentional," as used in the Instruction, "...means that the acts of the defendant were not inadvertent or accidental but were done with the purpose to cruelly maltreat."

In reaching the conclusion that specific intent is not an element of the crime of child abuse, the Supreme Court recognized that the Legislature, in enacting the child abuse statute, "...is concerned only with the results of the Defendant's conduct and not with whether the Defendant intended to produce such results." The Court also acknowledged "...the legislature's right to create crimes which do not require the

element of criminal intent," citing Department of Transportation v. Transportation Commission, 111 Wis. 2d 80, 99-100, 330 N.W. 2d 159 (1983).

B. SUGGESTIONS FOR STATUTORY REVISIONS

1. Definitions

a. Background

The current criminal child abuse statute [s. 940.201, Stats.] does not define the terms "torture" or "cruel maltreatment." It does contain examples of the types of injuries that are encompassed by the term "cruel maltreatment." Although this listing of injuries appears to limit the scope of the statute to physical injuries, the statute has been construed by the Court of Appeals [Campbell, supra] as also including forms of abuse which do not result in physical injuries.

The Law School Proposal suggests replacing the terms, "torture" and "cruel maltreatment" with the terms "bodily harm" and "great bodily harm" and, then, defining these terms to specify the behavior to be prohibited by the statute. The proposed definitions of "bodily harm" and "great bodily harm" expand on the present definitions of these terms used in the Criminal Code in s. 939.22 (4) and (14), Stats. The Criminal Code definitions are shown below, with the proposed language underscored and present language which is deleted shown as ~~stricken~~.

> "Bodily harm" means physical pain or injury or any impairment of physical condition. It includes, but is not limited to, severe bruising, lacerations, burns, the infliction of unnecessary pain and the temporary impairment of physical condition caused by the administration of excessive doses of drugs or other potentially harmful substances, and the debilitation caused by extreme neglect.
>
> "Great bodily harm" means ~~bodily~~ physical injury which creates a high probability of death, or which causes ~~serious~~ severe permanent disfigurement, or which causes a permanent or a protracted loss or impairment of the function of any bodily member or organ ~~or other serious injury~~. It includes but is not limited to fractured bones, internal injury and other serious injury.

The Law School Proposal describes the difference between the proposed definitions of "bodily harm" and "great bodily harm" by stating that the

"ultimate distinction" between the two "...depends on the circumstances of the individual cases." The statutory language which is proposed to accomplish this purpose is set forth below:

> The ultimate distinction between the definition of bodily harm and great bodily harm depends on the circumstances of the individual cases -- such as the age of the child (the younger the child the more serious the same injury) and the location of the injury (injury to head and genitalia being ordinarily more serious than that to buttocks or an extremity) [Law School Proposal, ss. 960.11 (3) and 960.12 (3)].*

The Law School Proposal suggests defining in the statutes child abuse which causes "emotional or mental harm". This term has no counterpart in the current Criminal Code. However, a comprehensive definition of "emotional damage," somewhat similar to the Law School Proposal definition, is contained in the current abused or neglected children reporting law [see s. 48.981 (1) (cm), Stats., Appendix]. The proposed definition is shown below:

> "Emotional or mental harm" means harm to a child's psychological or intellectual functioning. It includes, but is not limited to, emotional deprivation, verbal abuse or neglect. Emotional or mental harm may be evidenced by a severe degree of certain characteristics of the child, including, but not limited to, anxiety, depression, withdrawal or outward aggressive behavior [Law School Proposal, s. 960.02 (4)].

b. Suggestions

The Special Committee could consider replacing the terms "torture" and "cruel maltreatment," as used in the criminal abuse statute, with the terms "bodily harm" and "great bodily harm," and could consider (i) using the current definitions of these terms found in the Criminal Code definitions; or (ii) using the expanded definitions suggested in the Law School Proposal.

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*Throughout this Discussion Paper, where applicable, the language suggested in the Law School Proposal is cited.

If the Special Committee creates a distinction between the two levels of harm resulting from child abuse, it could consider instituting two different penalty levels.

[For the specific language suggested in the Law School Proposal, see the following provisions of the Proposal: s. 960.02, Definitions; s. 960.11, Intentionally Causing Bodily Harm to a Child; s. 960.12, Recklessly Causing Bodily Harm to a Child.]

2. Specific Crimes

a. Background

The Law School Proposal recommends replacing the current criminal child abuse statute [s. 940.201, Stats.] with four different statutory crimes related to different forms of conduct, resulting in different degrees of "bodily harm" and "great bodily harm" to a child, including:

(i) Intentional causation of bodily harm or great bodily harm to a child;

(ii) Reckless causation of bodily harm or great bodily harm to a child;

(iii) Bodily harm to a child caused by a failure to act; and

(iv) The intentional causation of emotional or mental harm to a child.

The proposed crimes of "reckless causation" and "failure to act" have no current specific statutory counterpart in Wisconsin law, although several general criminal statutes may be applicable, depending on the circumstances of the particular abusive situation. For example, current criminal statutes cover injury by conduct regardless of life [s. 940.23, Stats.]; injury by the negligent use of a weapon [s. 940.24, Stats.]; and homicide by reckless conduct [s. 940.06, Stats.].

Periodic judicial construction of the current criminal child abuse statute could have the effect of broadening its apparent limited scope to cover abusive conduct not now treated in the statutes. For example, the creation of a separate statute penalizing bodily harm to children, caused by the failure of a parent or responsible adult to take preventive action, is consistent with the Wisconsin Supreme Court interpretation of the criminal child abuse statute [s. 940.201, Stats.].

In a recent decision, the Supreme Court construed the term "subjects" (in the phrase "subjects a child to cruel maltreatment" in the criminal child abuse statute) so as not to limit the applicability of the statute "...only to persons who actively participate in abusing children." Instead, the Supreme Court applied the common meaning of the word "subjects" to encompass conduct other than the direct infliction of abuse. Specifically, the Court held that the term "subjects" covers "situations in which a person with a duty toward a child exposes the child to a foreseeable risk of abuse" [State v. Williquette, 129 Wis. 2d 239, 385 N.W. 2d 145 (1986)]. In the Williquette case, the mother allegedly knew that the father repeatedly abused their children but took no action to prevent the abuse.

If intentional and reckless acts which cause bodily harm or great bodily harm and the failure to act to prevent bodily harm are dealt with in separate statutory provisions, varying penalties can be imposed based on the nature of the conduct involved and the degree of harm caused to the child. Also, if "emotional or mental injury" is dealt with separately, it would clarify the type of nonphysical injuries which are covered by the current criminal child abuse statute.

b. Suggestions

The Special Committee could consider creating special criminal child abuse statutes recognizing various types and degrees of physical and psychological abuse caused by (i) intentional or reckless conduct or (ii) the failure of a person in a position of responsibility to act to prevent harm to a child.

If the Special Committee creates a series of specialized statutes dealing with physical and psychological child abuse, the Special Committee could consider a range of penalties which would reflect the type of conduct involved and the degree of injury caused to the child.

[For the specific language suggested in the Law School Proposal, see the following provisions of the Proposal: s. 960.11, Intentionally Causing Bodily Harm to a Child; s. 960.12, Recklessly Causing Bodily Harm to a Child; s. 960.13, Failing to Act; s. 960.31, Causing Emotional or Mental Harm to a Child.]

3. Age Applicability

a. Background

The current criminal child abuse statute [s. 940.201, Stats.] applies to persons under 16 years of age. The Law School Proposal suggests

revising the statute to apply to any child victim under 18 years of age, to conform to the majority of other statutes which make age 18 the age at which a person ceases to be a child and, therefore, is no longer subject to the crimes which recognize the special social interest of children.

b. Suggestions

The Special Committee could consider (i) changing the age criteria in the current criminal child abuse statute or (ii) establishing a uniform age for all crimes against children.

[For the specific language suggested in the Law School Proposal, see the following provision of the Proposal: s. 960.02 (3), Definitions.]

4. Presentence Examination

a. Background

The Special Committee may wish to review s. 972.16, Stats., relating to commitment for a presentence examination in cases of child abuse. Since Wisconsin's Sentencing Commission is charged with the responsibility of developing sentencing guidelines for all felony offenses, the value of s. 972.16 in aiding a court in sentencing a person convicted of criminal child abuse may be questionable. The Sentencing Commission guidelines must be taken into consideration by sentencing courts, but the courts are not obligated to conform their sentence to the sentence recommended in the guidelines.

b. Suggestions

The Special Committee could consider (i) repealing s. 972.16, Stats., in light of the sentencing guidelines law or (ii) retaining the present statute but revising it to conform to the sentencing court's obligations under the sentencing guidelines law.

5. Child Abuse Reporting

a. Background

Because there is a direct relationship between the child abuse and neglect reporting statute [s. 48.981, Stats.] and the criminal child abuse statute [s. 940.201, Stats.], any changes in the criminal child abuse statute affect the reporting law. Therefore, any changes in the scope of the child abuse statute should be consistent with the types of abuse required to be reported.

b. Suggestions

The Special Committee could consider creating specific forms of child abuse that would be recognized in both the child abuse reporting law and the criminal child abuse law in order to eliminate confusion for persons who are affected by these laws.

The Special Committee could also consider changes in the substantive and procedural requirements of the child abuse reporting law, unrelated to changes in the criminal child abuse statute, which may improve the prevention and treatment goals of the reporting law.

6. Privilege to Discipline Children

a. Background

The Wisconsin Supreme Court in Danforth [supra] reaffirmed an earlier decision of the Court which construed the language of the criminal child abuse statute [s. 940.201, Stats.] as "...connot[ing] conduct which is abhorrent to the sensitivities of the general public. It is not language which would embrace conduct reasonable persons would consider appropriate methods of child discipline" [Killory, supra].

The Law School Proposal recommends the creation of a statute, based on s. 3.08 of the Model Penal Code (American Law Institute, 1985), which deals with justification for the use of force. As explained in the comment to the Law School Proposal, the proposed statute:

> ...recognizes the right of one responsible for a child's welfare to physically discipline the child. It limits the use of physical discipline, however, to the force "the actor reasonably believes is necessary to control the child or prevent or punish misconduct."
>
> . . .
>
> As the privilege is defined [in the proposed statute], its scope has two determinants: (a) that force is used for the purpose of safeguarding or promoting the welfare of the child, including the prevention or punishment of his misconduct; and (b) that the force is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation.

b. Suggestions

The Special Committee could consider creating a separate statute, as recommended in the Law School Proposal, to address the privilege of a parent to discipline his or her children and to recognize that the reasonable exercise of this privilege is a defense to prosecution for any crime based on the disciplinary conduct.

[For the specific language suggested in the Law School Proposal, see the following provision of the Proposal: s. 960.03, Privilege to Discipline Children.]

PART II

SEXUAL EXPLOITATION OF CHILDREN

A. EXPLANATION OF CURRENT LAW

1. Description of Criminal Sexual Exploitation of Children Statute and Related Statutes

The sexual exploitation of children is prohibited and punishable as a Class C felony (a fine not to exceed $10,000 or imprisonment not to exceed 10 years, or both) under s. 940.203, Stats. The following activities are prohibited under this statute:

a. Knowingly employing, using, persuading, inducing, enticing or forcing a child to engage in sexually explicit conduct for the purpose of photographing, filming or displaying such conduct.

b. Photographing, filming or displaying a child engaged in sexually explicit conduct.

c. Knowingly producing, performing in, profiting from, promoting, distributing or possessing with intent to sell or distribute the products or "fruits" (photographics, tape recordings and other reproductions) of the prohibited conduct.

d. In the case of a parent, legal guardian or other person exercising temporary or permanent control of a child, knowingly permitting, allowing or encouraging the child to engage in sexually explicit conduct which is filmed, photographed or displayed in any way.

The statute defines "child" as any person under the age of 18 years. "Sexually explicit conduct" is defined as actual or simulated sexual intercourse; beastiality; masturbation; sexual sadism or sexual masochistic abuse; or lewd exhibition of the genitals or pubic area.

The sexual exploitation of children statute clearly prohibits the commercial sale or distribution of child pornography and includes within this prohibition the possession of such materials with intent to sell or distribute commercially. Although less clearly, the statutory language also appears to prohibit the noncommercial distribution of child pornography. The statute does not, however, prohibit the mere possession of child pornography; that is, possession for noncommercial purposes.

The child abuse and neglect reporting law, which is described in Part I of this Paper, treats a violation of the sexual exploitation of children

statute as "abuse" which is required to be reported to a law enforcement agency by a broad group of persons having professional dealings with children.

2. Discussion of Relevant Court Decisions and Other Interpretations of the Law

The Wisconsin statute on sexual exploitation of children is based, in part, on federal legislation [P.L. 95-225] and criminal statutes of New York State [New York Penal Law, art. 263 (McKinney)]. The New York penal statute was recently upheld against constitutional attack by the Supreme Court of the United States [New York v. Ferber, 458 U.S. 747, 102 S. Ct. 3348 (1982)].

The holding of the U.S. Supreme Court in Ferber is an important contribution toward understanding the state's authority to prohibit sexual exploitation as a form of physical and psychological abuse. Specifically, the Supreme Court in Ferber recognizes the propriety of dealing with the subject of sexual exploitation as a crime against life and bodily security [ch. 940, Stats.], as opposed to a crime against sexual morality [ch. 944, Stats.]. By treating sexual exploitation of children as a form of abuse, as opposed to obscenity, the offense is not subject to court-recognized tests of obscenity.

The basic guidelines or standards for determining what is legally obscene were recognized by the U.S. Supreme Court in Miller v. California, 413 U.S. 15, 93 S. Ct. 2607 (1973). The guidelines to be applied by the trial court are:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest... [citations omitted];
>
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
>
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value [Id., p. 24].

In the opinion of the majority of the U.S. Supreme Court in Ferber, states are entitled to greater leeway in the regulation of pornographic depictions of children than would be constitutionally permitted if the only basis for the restriction was the authority to regulate and restrict

obscene materials. Several reasons were expressed by the Court in support of this view, including recognition that:

a. The legislative judgment that the use of children as subjects of pornographic materials is harmful to the psychological, emotional and mental health of the child easily passes muster under the First Amendment;

b. The standard of Miller v. California, supra, for determining what is legally obscene is not a satisfactory solution to the child pornography problem; and

c. The classification of child pornography as a category of material outside the First Amendment's protection is not incompatible with the Court's decisions dealing with what types of speech are not protected by the First Amendment.

The Court concluded that:

> When a definable class of material, such as that covered by s. 263.15 [New York Penal Code (McKinney, 1980)], bears so heavily and pervasively on the welfare of children engaged in this production, we think the balance of competing interest is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment [p. 3358, S. Ct.; emphasis added].

The Ferber case and other court decisions are relevant to other aspects of the crime of sexual exploitation of children. In particular, certain gaps and ambiguities in the scope of coverage of the current statute are ripe for discussion and evaluation in light of these cases.

As discussed in Section 1, above, the current statute prohibiting sexual exploitation of children applies to all persons involved in the production of child pornography, including parents who allow their children to engage in such activity and persons who profit from the distribution of such material. However, the statute does not penalize persons who purchase or otherwise possess such material for personal use. Also, the statute apparently makes unlawful the distribution of child pornography, regardless of financial benefit; but it does not deal in a comprehensive manner with the noncommercial transfer or exchange of such materials between interested persons.

Expansion of the statute to prohibit the possession of child pornography for any purpose or the noncommercial transfer of such material in order to address this gap in coverage would raise constitutional issues

which would undoubtedly require judicial resolution. This is because a strong argument can be made that a ban on personal possession of child pornography would be contrary to the decision of the U.S. Supreme Court in Stanley v. Georgia, 394 U.S. 557, 89 S. Ct. 1243 (1969).

Stanley v. Georgia involved the seizure of a pornographic film by police while in the process of executing a legal search for other contraband in the defendant's home. Stanley was arrested for possession of obscene material under Georgia law. In declaring the Georgia law unconstitutional, the U.S. Supreme Court held that the First Amendment prevents conviction for possessing and reading obscene material in the privacy of one's home:

> If the First Amendment means anything, it means that a State has no business telling a man sitting alone in his house, what books he may read or what films he may watch [Id., p. 565].

Based on Stanley, an argument may be made that prohibition of the mere possession or free exchange of child pornography may be unconstitutional. Specifically, it may be asserted that the possession and exchange of child pornography may be banned only if a possessor or distributor demonstrates an intent to sell it or otherwise profit from its possession.

On the other hand, it may be possible to carve out an exception to the First Amendment rights recognized in Stanley, based on the argument that the possessor is promoting child abuse by the acquisition and exchange of such material. This argument would rely on the reasoning of the U.S. Supreme Court in Ferber, supra, in which the Court classified child pornography as a category of material outside the First Amendment's protection. The key issue raised by this argument is not whether the material is obscene, but whether possession and noncommercial transfer of such material perpetrates sexual child abuse and is, therefore, conduct outside the scope of protection of the First Amendment.

The argument that possession and noncommercial transfer of child pornography is outside the scope of the protection afforded under the First Amendment may be buttressed by the recent holding of the U.S. Supreme Court in Bowers v. Hardwick, 46 CCH S. Ct. Bull. p. B3933 (No. 85-140; June 30, 1986).

The U.S. Supreme Court in Bowers upheld the constitutionality of a Georgia statute criminalizing the act of consensual sodomy between homosexuals. In reaching its decision, the U.S. Supreme Court rejected the argument, based on the decision of the Court in Stanley, supra, that

the First Amendment prevents conviction where the homosexual conduct occurs in the privacy of the home.

Although the Court affirmed that "Stanley protects conduct that would not have been protected outside the home, and it partially prevented the enforcement of state obscenity laws...," it emphasized that the Stanley decision was "...firmly grounded in the First Amendment." The Court declared that the "...right pressed upon us here has no similar support in the text of the Constitution." The Court explained:

> Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, cannot escape the law where they are committed at home. Stanley itself recognized that its holding offered no protection for the possession in the home of drugs, firearms, or stolen goods [citations omitted] and if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road [p. B3943].

The U.S. Supreme Court has upheld state criminal laws classifying child pornography as a category of material outside the First Amendment's protection. Therefore, it may be that the U.S. Supreme Court, if faced with the issue of whether the First Amendment prevents states from enacting prohibitions on the the personal possession and noncommercial distribution of child pornography, would decide, as it did in Bowers, that the prohibited conduct is outside the scope of the First Amendment's protection.

B. SUGGESTIONS FOR STATUTORY REVISIONS

1. Restatement Without Substantive Change

a. Background

The current crime of sexual exploitation of children [s. 940.203, Stats.] is expressed in terms of a series of specific prohibitions beginning with the phrase "no person may...." Most crimes set forth in the Criminal Code begin with the pronoun "whoever" followed by a

description of the prohibited conduct. The Law School Proposal recommends that the statute be restated without substantive change to conform to the style of other statutes in the Criminal Code.

b. Suggestion

The Special Committee could consider restating the crime of sexual exploitation of children to conform to the style of other Criminal Code statutes.

[For the specific language suggested in the Law School Proposal, see the following provision of the Proposal: s. 960.22, Sexually Exploiting a Child.]

2. Expanding the Scope of Coverage

a. Background

As discussed in the previous section of this Paper, a recent decision of the U.S. Supreme Court has held that child pornography is a category of material outside the First Amendment's protection. Therefore, the Supreme Court-approved standards for determining what is legally obscene are not applicable to such materials [Ferber, supra].

The current crime of sexual exploitation clearly prohibits the production and commercial distribution of the products of child sexual exploitation. The statute also appears to prohibit the distribution for noncommercial purposes as, for example, by exchange between pedophiles. The statute does not prohibit the possession of child pornography by persons who were not involved in the production or commercial distribution of such materials.

An argument can be made that, because child pornography is not protected by the First Amendment, the state has the authority to prohibit the personal possession and noncommercial transfer of this material. Justification for this position may be found in the reasoning of the U.S. Supreme Court in the Ferber case, supra. This view is also supported by the majority opinion of the U.S. Supreme Court in the Bowers case, supra, wherein the Court ruled that engagement in illegal conduct and the possession and use of illegal substances are not immune from state prohibitions simply because they are committed at home.

In reaching this conclusion, the Court in Bowers clarified that the in-home privacy right recognized in the Stanley case, supra, applies only where the right asserted is "firmly grounded in the First Amendment." Since the Court in Ferber has held that child pornography is outside the

scope of the First Amendment's protection, an argument can be made that a state may constitutionally prohibit the possession and noncommercial transfer of such materials.

b. Suggestion

The Special Committee could consider modifying and expanding the crime of sexual exploitation of children so as to clearly prohibit the transfer, exchange or possession of child pornography, regardless of any profit motive or commercial benefit.

3. Reporting Requirements

a. Background

"Abuse," as defined in the child abuse and neglect reporting law [s. 48.981, Stats.], specifically includes a violation of the crime of sexual exploitation of children [s. 940.203, Stats.]. Under the reporting law, a broad group of persons enumerated in the statute are required to report to a law enforcement agency facts which create a "reasonable cause to suspect that a child seen in the course of professional duties has been abused or neglected." The list of persons includes a broad group of persons having professional dealings with children, such as medical or mental health professionals, school teachers, day care providers, law enforcement officers and other persons who are likely to come in contact with children in a professional capacity [s. 48.981 (2), Stats.].

The list does not include certain persons who are likely to come in contact with photographic materials which may constitute evidence of a violation of the crime against child sexual exploitation. For example, the reporting statute does not include, in its enumeration of persons required to report evidence of child abuse, commercial film and photographic processors who may observe, in their professional capacity, materials which depict a child engaged in sexually explicit conduct in violation of the crime of sexual exploitation of children.

b. Suggestion

The Special Committee could revise the child abuse and neglect reporting statute [s. 48.981] to specifically require commercial film and photographic processors to report information relating to photographic materials that they observe, during the normal course of performing their duties, which constitute a "reasonable cause to suspect" that a child depicted in such items has been sexually exploited in violation of s. 940.203, Stats.

PART III

SEXUAL ASSAULT OF CHILDREN

A. EXPLANATION OF CURRENT LAW

1. Description of Provisions of the Sexual Assault Statute Which Are Directed at Child Victims and Related Statutes

Under current Wisconsin law, sexual assault is classified as a crime against bodily security and is included in ch. 940, Stats., "Crimes--Life and Bodily Security." [Prior to its revision in 1976, sexual assault, or rape, was classified as a crime against sexual morality.] The current criminal sexual assault statute defines four degrees of sexual assault and establishes penalties for each magnitude of the crime, as affected by factors such as the extent of injury to the victim, the force or threat of force exercised by the perpetrator and the age of the victim.

Child victims of sexual assault are dealt with specifically in three provisions of the statute:

a. Under s. 940.225 (1) (d), Stats., any person who has sexual contact or sexual intercourse with a person 12 years of age or younger commits first degree sexual assault, punishable as a Class B felony (imprisonment not to exceed 20 years).

b. Under s. 940.225 (2) (e), any person who has sexual contact or sexual intercourse with a person who is over the age of 12 years and under the age of 16 years commits second degree sexual assault, punishable as a Class C felony (a fine not to exceed $10,000 or imprisonment not to exceed 10 years, or both).

c. Section 940.225 (4), Stats., specifies that "consent," as defined in the statute, "is not an issue in alleged violations of subs. (1) (d) and (2) ... (e)," the offenses described in items a and b, above. This means that the prosecution is not required to prove that the child victim did not consent to the sexual assault. Conversely, this provision precludes the alleged offender from raising the defense that the victim consented to the sexual contact or intercourse.

"Sexual contact" is defined in s. 940.225 (5) (a) to mean any intentional touching, either directly or through clothing by the use of any body part or object, of the victim's or alleged offender's intimate parts, if the intentional touching is either for the purpose of sexually degrading or sexually humiliating the victim or sexually arousing the

alleged offender or if the touching contains the elements of actual or attempted battery.

"Sexual intercourse," in s. 940.225 (5) (b), incorporates the definition of this term in s. 939.22 (36), which requires vulvar penetration but does not require emission (the general Criminal Code definition), as well as several other specific forms of sexual conduct, including "cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or any object into the genital or anal opening either by the defendant or upon the defendant's instruction."

2. Discussion of Relevant Court Decisions and Other Interpretations of the Law

The current sexual assault statute contains ambiguous terminology regarding the age categories of child victims to which these provisions apply. The phrase "12 years of age or younger," in s. 940.225 (1) (d), and the phrase "over the age of 12 years and under the age of 16 years," in s. 940.225 (2) (e), are subject to different interpretations. As explained in the introductory comment and the comment to the Wisconsin Jury Instructions--Criminal, Number 1206 (1983):

> The phrase "12 years of age or younger" [in s. 940.225 (1) (d), Stats.] is ambiguous when read by itself, and the problem is intensified when it is read in light of s. 940.225 (2) (e) which provides for punishment as a second degree sexual assault if the victim is "over the age of 12 years." Reading these two statutes together makes the question obvious: Is a person 12 years, six months, of age "12 years of age or younger" or "over the age of 12 years"? It can be persuasively argued that in common sense, everyday usage, a person "is 12" until he reaches his 13th birthday. However, it can also be argued that in common sense, everyday usage, the person is "over the age of 12" as soon as that person has reached his 12th birthday. Ample case law can be cited to support either conclusion....
>
> After spending a great deal of time and effort on this problem, the Committee made the following conclusion. First, the statement of age category is ambiguous. Second, the ambiguity is unnecessary, since there are established ways of

> stating age limits in statutes to avoid confusion. Third, that where unnecessary ambiguity exists in a penal statute, the ambiguity must be resolved in favor of the defendant. The final conclusion was made with some reluctance, because applying it to the sexual assault age categories may lead to results that are contrary to what the legislature "probably" intended.
>
> Applying these conclusions to s. 940.225 (1) (d), the category of persons "12 years of age or younger" has been reworded in the instruction as "has not attained the age of 12 years." Therefore, under this interpretation, an offense against a victim 12 years and six months old would be a second degree sexual assault under s. 940.225 (2) (e), see Wisconsin JI-Criminal, 1216 and 1217.

The Wisconsin Court of Appeals does not agree with the interpretation in the Wisconsin Jury Instructions that the phrase "12 years of age or younger" should be interpreted to mean a person who "has not attained the age of 12 years" and that the phrase "over the age of 12 years" should be interpreted to mean a person who has attained the age of 12 years. In State v. Morrow, 95 Wis. 2d 395, 291 N.W. 298 (Ct. App. 1980), the Court interpreted the phrase "12 years of age or younger" to mean a child under the age of 13. Using this interpretation, the phrase "over the age of 12 years" refers to persons who have attained age 13.

However, it should be noted that the interpretation of the ambiguous age categories in s. 940.225 (1) (d), by the Court of Appeals in Morrow, was contained in dicta, which expresses the interpretation but does not explain the reasoning which led to this conclusion. Since the Morrow case, the State Supreme Court has recognized that an ambiguity exists as to the statutory age category relating to the victim who has or has not reached his or her 12th birthday. The Court in both cases stated, however, because the issue was not raised in the case, it would not be decided by the Court [State v. Kummer, 100 Wis. 2d 220, 226 N. 4, 301 N.W. 2d 240, cert. denied, 451 U.S. 1020 (1981), and State v. Cuyler, 100 Wis. 2d 133, 136, 327 N.W. 2d 662, 664 (1983)].

While not deciding the issue, the Supreme Court did point out that the Wisconsin Jury Instructions--Criminal and accompanying notes have interpreted "12 years of age or younger" to mean one who has not yet reached his or her 12th birthday [State v. Cuyler, supra]. This may be an indication that the Supreme Court, if compelled to decide this issue, would adopt reasoning similar to that expressed in the comments to the Wisconsin Jury Instructions and interpret the ambiguous phrase in sub. (1)

(d) to mean a person who has not reached his or her 12th birthday and the reference to a person "who is over the age of 12 years" in sub. (2) (e) to mean a person who has reached his or her 12th birthday.

B. SUGGESTIONS FOR STATUTORY REVISIONS

1. Definitions

a. Background

The Law School Proposal suggests minor changes in the statutorily-defined terms "sexual contact" and "sexual intercourse." Although not explained in the comments to the Law School Proposal, the revised definitions appear only to eliminate redundant terminology, inappropriate punctuation and unnecessary references to other statutes. The current Criminal Code definitions of these terms are shown below, with the proposed language underscored and present language which is deleted shown as stricken:

> "Sexual contact" means any intentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is either for the purpose of sexually degrading~~,~~ or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant ~~or if the touching contains the elements of actual or attempted battery under s. 940.19 (1)~~.
>
> "Sexual intercourse" ~~includes the meaning assigned under s. 939.22 (36)~~ means vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by the defendant or upon the defendant's instruction. The emission of semen is not required [Law School Proposal, s. 960.02 (10) and (11)].

b. Suggestion

The Committee could consider revising the current definitions of "sexual contact" and "sexual intercourse" in the sexual assault statute as recommended in the Law School Proposal.

[For the specific language suggested in the Law School Proposal, see the following provision of the Proposal: s. 960.02 (10) and (11).]

2. Age Criteria

a. Background

The Law School Proposal recommends restating the age category in sub. (1) (d) of the sexual assault statute [s. 940.225, Stats.], which currently reads "12 years of age or younger" to refer to a "person who has not attained the age of 13 years." This recommendation is consistent with the opinion of the Court of Appeals in State v. Morrow, supra, but is contrary to the Wisconsin Jury Instructions--Criminal, which interprets the current age category to mean referring to a person who has not yet reached his or her 12th birthday.

Regarding the age category in sub. (2) (e) of the sexual assault statute [s. 940.225], the Law School Proposal recommends replacing the existing language, "a person who is over the age of 12 years and under the age of 16 years," with the phrase "a person who has not attained the age of 16 years." The comment to the Law School Proposal justifies this recommendation by the following statement:

> The inclusion of the element that a child be over 12 years is a practical burden on the prosecutor with no commensurate benefit to the defendant. If the contact or intercourse occurs with a child who has not attained the age of 13, first degree sexual assault can be charged. If the child is between ages 13 and 16, second will be charged. If in the prosecutor's discretion the conduct warrants only a charge of second degree, even if the child is not yet 13, the defendant can hardly complain and society's interest will be served by diligent prosecution where it might be served less well had the prosecutor been forced to bring the case a first degree sexual assault. The prosecutor will also have the option of accepting a plea to second degree sexual assault if the victim is under 13, saving the society of the financial cost of the trial and saving the victim the emotional cost. In addition, should the victim be 13, 14 or 15, the prosecutor need not waste time by proving beyond a reasonable doubt that the victim was at least 13 at the time the assault occurred.

b. Suggestions

The Special Committee could consider replacing the existing ambiguous age categories in subs. (1) (d) and (2) (e) of the sexual assault statute [s. 940.225, Stats.] with unambiguous age categories. By using the phrase "has not attained the age of" the ambiguity in the existing age categories is removed.

In the restatement of the age category, the Special Committee could choose to either (i) refer to a child who has not attained the age of 12 years (the Wisconsin Jury Instruction--Criminal interpretation) or (ii) a child who has not attained the age of 13 years [the interpretation in State v. Morrow, supra, and the recommendation in the Law School Proposal]. The Special Committee could also consider developing some other age category which it deems appropriate.

[For the specific language suggested in the Law School Proposal, see the following provision of the Proposal: s. 960.10 (1) and (2).]

3. Failure to Act

a. Background

The Law School Proposal creates a provision that does not have a counterpart in the current sexual assault law. This provision "...recognizes that the person responsible for the welfare of the child has a duty to protect the child from assault by others" and punishes failure to prevent the child from being assaulted, if capable of doing so, as a Class C felony (punishable by a fine not to exceed $10,000 or imprisonment not to exceed 10 years, or both). The comment to the Law School Proposal suggests that this provision is consistent with s. 230.4, Endangering Welfare of Children, of the Model Penal Code (the American Law Institute, 1980), which states:

> A parent, guardian, or other person supervising the welfare of children under 18 commits a misdemeanor if he knowingly endangers the child's welfare by violating a duty of care, protection or support.

The comment to the Law School Proposal further observes that:

> The Model Penal Code's recognition that a person responsible for a child's welfare has a duty to protect that child, and violation of that duty is a crime, was explicitly adopted in Wisconsin by the

Wisconsin Court of Appeals in State of Wisconsin v. Williquette, No. 84-2046-CR, Ct. Apps., 1985.

As discussed in Part I of this Paper, the decision of the Court of Appeals in Williquette was affirmed by the State Supreme Court in 129 Wis. 2d 239, 385 N.W. 2d 145 (1986). The case involved the issue of whether or not the mother's conduct in failing to take action to prevent the abuse of her children by the father was child abuse in violation of s. 940.201, Stats. The Court of Appeals concluded that the mother violated this statute by aiding and abetting the father in abusing the children. The Supreme Court concluded that the statutory language of the criminal child abuse statute encompassed conduct other than the direct infliction of abuse. Specifically, the Supreme Court held that the phrase "subjects a child to cruel maltreatment" in the criminal child abuse statute covers "situations in which a person with a duty toward a child exposes the child to a foreseeable risk of abuse."

b. Suggestion

The Committee could consider creating a separate subsection in the sexual assault statute that recognizes that a person responsible for the welfare of a child has a duty to protect that child from assault by others, as suggested in the Law School Proposal. This provision would essentially codify the decision of the State Supreme Court in State v. Williquette, supra, and specifically recognize that the person responsible for the welfare of the child has a duty to protect the child from assault by others and to punish the failure to prevent the assault, when capable of doing so, as a Class C felony (punishable by a fine not to exceed $10,000 or imprisonment not to exceed 10 years, or both).

[For the specific language suggested in the Law School Proposal, see the following provision of the Proposal: s. 960.10 (3).]

4. Privacy of Child Victims of Sexual Assault

a. Background

Under the Rights of Victims and Witnesses of Crime Act [ch. 950, Stats.], a statement of legislative intent provides, in part, that:

> The legislature urges the news media to use restraint in revealing the identity of child victims or witnesses, especially in sensitive cases [s. 950.055, Stats.].

It appears that the media substantially complies with this admonition. However, because this statute is a statement of legislative intent, there is no penalty that applies where the news media fails to exercise restraint and reveals the identity of a child victim of a sensitive crime, such as sexual assault.

Because of the severe emotional and psychological trauma associated with sexual assaults, an argument can be made that child victims need stronger privacy protections than afforded under the current statement of legislative intent in the crime victims' rights law.

b. Suggestions

The Committee could consider creating a special statute prohibiting the publishing or broadcasting of the identity of a child victim of sexual assault. Penalties could be provided for such a violation.

As an alternative to an absolute ban against the publication or broadcasting, the Committee could consider a provision which would allow the release of some identifying biographical information upon the request or approval of a victim's parent or guardian and with the approval of the trial judge. The judge could be required to consider the best interests of the child before releasing identifying information, even if the victim's parent or guardian consents.

If the Special Committee decides to develop a statute directed at restricting media publication or broadcasting of the identity of child sexual assault victims, constitutional issues regarding infringement of the "freedom of the press," which is protected by the First Amendment, should be explored.

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APPENDIX

STATUTES DISCUSSED IN DISCUSSION PAPER 86-1A

(LISTED IN NUMERICAL ORDER)

STATUTES DISCUSSED IN DISCUSSION PAPER 86-1A
(LISTED IN NUMERICAL ORDER)

48.981 ABUSED OR NEGLECTED CHILDREN. (1) DEFINITIONS. In this section:

(a) "Abuse" means any of the following:

1. Physical injury inflicted on a child by other than accidental means.

2. Sexual intercourse or sexual contact under s. 940.225.

3. A violation of s. 940.203.

4. Permitting, allowing or encouraging a child to violate s. 944.30.

5. Emotional damage.

(b) "Child" means any person under 18 years of age.

(cm) "Emotional damage" means harm to a child's psychological or intellectual functioning which is exhibited by severe anxiety, depression, withdrawal or outward aggressive behavior, or a combination of those behaviors, which is caused by the child's parent, guardian, legal custodian or other person exercising temporary or permanent control over the child and for which the child's parent, guardian or legal custodian has failed to obtain the treatment necessary to remedy the harm. "Emotional damage" may be demonstrated by a substantial and observable change in behavior, emotional response or cognition that is not within the normal range for the child's age and stage of development.

(d) "Neglect" means failure, refusal or inability on the part of a parent, guardian, legal custodian or other person exercising temporary or permanent control over a child, for reasons other than poverty, to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child.

(e) "Physical injury" includes but is not limited to lacerations, fractured bones, burns, internal injuries, severe or frequent bruising or great bodily harm as defined under s. 939.22 (14).

(f) "Record" means any document relating to the investigation, assessment and disposition of a report under this section.

(g) "Reporter" means a person who reports suspected abuse or neglect or a belief that abuse or neglect will occur under this section.

(h) "Subject" means a person named in a report or record as either of the following:

1. A child who is the victim or alleged victim of abuse or neglect or who is threatened with abuse or neglect.

2. A person who either is suspected of abuse or neglect, is exercising temporary or permanent control over a child who is threatened with abuse or neglect or has been determined to have abused or neglected a child.

(2) PERSONS REQUIRED TO REPORT. A physician, coroner, medical examiner, nurse, dentist, chiropractor, optometrist, other medical or mental health professional, social or public assistance worker, school teacher, administrator or counselor, child care worker in a day care center or child caring institution, day care provider, alcohol or other drug abuse counselor, member of the treatment staff employed by or working under contract with a county department under s. 46.23, 51.42 or 51.437, physical therapist, occupational therapist, speech therapist, emergency medical technician -- advanced (paramedic), ambulance attendant or police or law enforcement officer having reasonable cause to suspect that a child seen in the course of professional duties has been abused or neglected or having reason to believe that a child seen in the course of professional duties has been threatened with abuse or neglect and that abuse or neglect of the child will occur shall report as provided in sub. (3). Any other person, including an attorney, having reason to suspect that a child has been abused or neglected or reason to believe that a child has been threatened with abuse or neglect and that abuse or neglect of the child will occur may make such a report. No person making a report under this subsection may be discharged from employment for so doing.

(3) REPORTS; INVESTIGATION. (a) Referral of report. A person required to report under sub. (2) shall immediately inform, by telephone or personally, the county department or the sheriff or city police department and, in the case of American Indian children, the tribal government of the facts and circumstances contributing to a suspicion of child abuse or neglect or to a belief that abuse or neglect will occur. The sheriff or police department shall within 12 hours, exclusive of Saturdays, Sundays or legal holidays, refer to the county department and, in the case of American Indian children, the tribal government all cases reported to it. The county department may require that a subsequent report be made in writing. Each county department shall adopt a written policy specifying the kinds of reports it will routinely report to local law enforcement authorities.

(b) Duties of local law enforcement agencies. 1. Any person reporting under this section may request an immediate investigation by the sheriff or police department if the person has reason to suspect that a child's health or safety is in immediate danger. Upon receiving such a request, the sheriff or police department shall immediately investigate to

determine if there is reason to believe that the child's health or safety is in immediate danger and take any necessary action to protect the child.

2. If the investigating officer has reason under s. 48.19 (1) (c) or (d) 5 to take a child into custody, the investigating officer shall take the child into custody and deliver the child to the intake worker under s. 48.20.

3. If the police or other law enforcement officials determine that criminal action is necessary, they shall refer the case to the district attorney for criminal prosecution.

(c) Duties of county departments. 1. Within 24 hours after receiving a report under sub. (3) (a), the county department shall, in accordance with the authority granted it under s. 48.57 (1) (a), initiate a diligent investigation to determine if the child is in need of protection or services. The investigation shall be conducted in accordance with standards established by the department for conducting child abuse and neglect investigations and shall include observation of or an interview with the child, or both, and, if possible, a visit to the child's home or usual living quarters and an interview with the child's parents, guardian or legal custodian. At the initial visit to the child's home or living quarters, the person making the investigation shall identify himself or herself and the county department involved to the child's parents, guardian or legal custodian. The county department may contact, observe or interview the child at any location without permission from the child's parent, guardian or legal custodian if necessary to determine if the child is in need of protection or services, except that the person making the investigation may enter a child's home or living quarters only with permission from the child's parent, guardian or legal custodian or after obtaining a court order to do so.

2. If the person making the investigation determines that any child in the home requires immediate protection, he or she shall take the child into custody under s. 48.08 (2) or 48.19 (1) (c) and deliver the child to the intake worker under s. 48.20.

3. If the county department determines that a child, any member of the child's family or the child's guardian or legal custodian is in need of services, the county department shall offer to provide appropriate services or to make arrangements for the provision of services. If the child's parent, guardian or legal custodian refuses to accept the services, the county department may request that a petition be filed under s. 48.13 alleging that the child who is the subject of the report or any other child in the home is in need of protection or services.

4. The county department shall determine, within 60 days after receipt of a report, whether abuse or neglect has occurred or is likely to occur. The determination shall be based on a preponderance of the evidence produced by the investigation. A determination that abuse or neglect has occurred may not be based solely on the fact that the child's parent, guardian or legal custodian in good faith selects and relies on prayer or other religious means for treatment of disease or for remedial care of the child. In making a determination that emotional damage has occurred, the county department shall give due regard to the culture of the subjects and shall establish that the person alleged to be responsible for the emotional damage is unwilling to remedy the harm. This subdivision does not prohibit a court from ordering medical services for the child if the child's health requires it.

5. The county department shall maintain a record of its actions in connection with each report it receives. The record shall include a description of the services provided to any child and to the parents, guardian or legal custodian of the child. The county department shall update the record every 6 months until the case is closed.

6. The county department shall, within 60 days after it receives a report from a person required under sub. (2) to report, inform the reporter what action, if any, was taken to protect the health and welfare of the child who is the subject of the report.

7. The county department shall cooperate with law enforcement officials, courts of competent jurisdiction, tribal governments and other human service agencies to prevent, identify and treat child abuse and neglect. The county department shall coordinate the development and provision of services to abused and neglected children and to families where abuse or neglect has occurred or to children and families where circumstances justify a belief that abuse or neglect will occur.

8. Using the format prescribed by the department, each county department shall provide the department with information about each report it receives and about each investigation it conducts. This information shall be used by the department to monitor services provided by county departments. The department shall use nonidentifying information to maintain statewide statistics on child abuse and neglect, and for planning and policy development.

9. The county agency may petition for child abuse restraining orders and injunctions under s. 48.25 (6).

(d) Independent investigation. 1. In this paragraph, "agent" includes, but is not limited to, a foster parent or other person given custody of a child or a human services professional employed by a county

department under s. 51.42 or 51.437 who is working with the child under contract with or under the supervision of the county department under s. 46.215 or 46.22.

2. If an agent or employe of a county department required to investigate under this subsection is the subject of a report, or if the county department determines that, because of the relationship between the county department and the subject of a report, there is a substantial probability that the county department would not conduct an unbiased investigation, the county department shall, after taking any action necessary to protect the child, notify the department. Upon receipt of the notice, the department or a county department or child welfare agency designated by the department shall conduct an independent investigation. If the department designates a county department under s. 46.215, 46.22, 46.23, 51.42 or 51.437, that county department shall conduct the independent investigation. If a licensed child welfare agency agrees to conduct the independent investigation, the department may designate that agency to do so. The powers and duties of the department or designated county department or child welfare agency making an independent investigation are those given to county departments under sub. (3) (c).

(4) IMMUNITY FROM LIABILITY. Any person or institution participating in good faith in the making of a report, conducting an investigation, ordering or taking of photographs or ordering or performing medical examinations of a child under this section shall have immunity from any liability, civil or criminal, that results by reason of the action. For the purpose of any proceeding, civil or criminal, the good faith of any person reporting under this section shall be presumed. The immunity provided under this subsection does not apply to liability for abusing or neglecting a child.

(5) CORONER'S REPORT. Any person or official required to report cases of suspected child abuse or neglect who has reasonable cause to suspect that a child died as a result of child abuse or neglect shall report the fact to the appropriate medical examiner or coroner. The medical examiner or coroner shall accept the report for investigation and shall report the findings to the appropriate district attorney, the department, the county department and, if the institution making the report initially is a hospital, to the hospital.

(6) PENALTY. Whoever intentionally violates this section by failure to report as required may be fined not more than $1,000 or imprisoned not more than 6 months or both.

(7) CONFIDENTIALITY. (a) All reports and records made under this section and maintained by the department, county departments and other

persons, officials and institutions shall be confidential. Reports and records may be disclosed only to the following persons:

1. The subject of a report, except that the person or agency maintaining the record or report may not disclose any information that would identify the reporter.

2. Appropriate staff of the department or a county department.

3. An attending physician for purposes of diagnosis and treatment.

4. A child's foster parent or other person having custody of the child, except that the person or agency maintaining the record or report may not disclose any information that would identify the reporter.

5. A professional employe of a county department under s. 51.42 or 51.437 who is working with the child under contract with or under the supervision of the county department under s. 46.215 or 46.22.

6. A multidisciplinary child abuse and neglect team recognized by the county department.

7. Another county department currently investigating a report of suspected or threatened child abuse or neglect involving a subject of the record or report.

8. A law enforcement officer or agency for purposes of investigation or prosecution.

9. A court or administrative agency for use in a proceeding relating to the licensing or regulation of a facility regulated under this chapter.

10. A court conducting proceedings related to a petition under s. 48.13 or a court conducting dispositional proceedings under subch. VI in which abuse or neglect of the child who is the subject of the report or record is an issue.

11. The county corporation counsel or district attorney representing the interests of the public in proceedings under subd. 10.

12. A person engaged in bona fide research, with the permission of the department. Information identifying subjects and reporters may not be disclosed to the researcher.

13. The department, a county department or licensed child welfare agency ordered to conduct a screening or an investigation of a stepparent under s. 48.88 (2) (c).

14. A grand jury if it determines that access to specified records is necessary for the conduct of its official business.

(b) Notwithstanding par. (a), either parent of a child may authorize the disclosure of a record for use in a child custody proceeding under s. 767.24 when the child has been the subject of a report. Any information that would identify a reporter shall be deleted before disclosure of a record under this paragraph.

(c) Notwithstanding par. (a), the subject of a report may authorize the disclosure of a record to the subject's attorney. The authorization shall be in writing. Any information that would identify a reporter shall be deleted before disclosure of a record under this paragraph.

(cm) A county agency may disclose information from its records for use in proceedings under s. 48.25 (6) or 813.122.

(d) The department may have access to any report or record maintained by a county department under this section.

(e) A person to whom a report or record is disclosed under this subsection may not further disclose it, except to the persons and for the purposes specified in this section.

(f) Any person who violates this subsection, or who permits or encourages the unauthorized dissemination or use of information contained in reports and records made under this section, may be fined not more than $1,000 or imprisoned not more than 6 months or both.

(8) EDUCATION, TRAINING AND PROGRAM DEVELOPMENT AND COORDINATION. (a) The department and county departments to the extent feasible shall conduct continuing education and training programs for department and county department staff, persons and officials required to report, the general public and others as appropriate. The programs shall be designed to encourage reporting of child abuse and neglect, to encourage self-reporting and voluntary acceptance of services and to improve communication, cooperation and coordination in the identification, prevention and treatment of child abuse and neglect. The department and county departments shall develop public information programs about child abuse and neglect.

(b) The department shall to the extent feasible ensure that there are available in the state administrative procedures, personnel trained in child abuse and neglect, multidisciplinary programs and operational procedures and capabilities to deal effectively with child abuse and neglect cases. These procedures and capabilities may include, but are not limited to, receipt, investigation and verification of reports;

determination of treatment or ameliorative social services; or referral to the appropriate court.

(c) In meeting its responsibilities under par. (a) or (b), the department or a county department may contract with any public or private organization which meets the standards set by the department. In entering into the contracts the department or county department shall give priority to parental organizations combating child abuse and neglect.

(d) 1. Each county department staff member and supervisor whose responsibilities include investigation or treatment of child abuse and neglect shall successfully complete training in child abuse and neglect protective services approved by the department. The department shall monitor compliance with this subdivision according to rules promulgated by the department.

2. Each year the department shall make available training programs that permit intake workers and county department staff members and supervisors to satisfy the requirements under subd. 1 and s. 48.06 (1) (am) 2 and (2) (c).

(9) ANNUAL REPORTS. No later than October 1 of each year the department shall prepare and transmit to the governor and the legislature a report on the status of child abuse and neglect programs. The report shall include a full statistical analysis of the child abuse and neglect reports made through the last calendar year, an evaluation of services offered under this section and their effectiveness, and recommendations for additional legislative and other action to fulfill the purpose of this section. The department shall provide statistical breakdowns by county, if requested by a county.

939.50 CLASSIFICATION OF FELONIES. (1) Except as provided in ss. 946.83 and 946.85, felonies in chs. 939 to 948 are classified as follows:

(a) Class A felony.

(b) Class B felony.

(c) Class C felony.

(d) Class D felony.

(e) Class E felony.

(2) A felony is a Class A, B, C, D or E felony when it is so specified in chs. 939 to 948.

(3) Penalties for felonies are as follows:

(a) For a Class A felony, life imprisonment.

(b) For a Class B felony, imprisonment not to exceed 20 years.

(c) For a Class C felony, a fine not to exceed $10,000 or imprisonment not to exceed 10 years, or both.

(d) For a Class D felony, a fine not to exceed $10,000 or imprisonment not to exceed 5 years, or both.

(e) For a Class E felony, a fine not to exceed $10,000 or imprisonment not to exceed 2 years, or both.

939.51 CLASSIFICATION OF MISDEMEANORS. (1) Misdemeanors in chs. 939 to 948 are classified as follows:

(a) Class A misdemeanor.

(b) Class B misdemeanor.

(c) Class C misdemeanor.

(2) A misdemeanor is a Class A, B or C misdemeanor when it is so specified in chs. 939 to 948.

(3) Penalties for misdemeanors are as follows:

(a) For a Class A misdemeanor, a fine of not to exceed $10,000 or imprisonment not to exceed 9 months, or both.

(b) For a Class B misdemeanor, a fine not to exceed $1,000 or imprisonment not to exceed 90 days, or both.

(c) For a Class C misdemeanor, a fine not to exceed $500 or imprisonment not to exceed 30 days, or both.

939.52 CLASSIFICATION OF FORFEITURES. (1) Except as provided in s. 946.85, forfeitures in chs. 939 to 948 are classified as follows:

(a) Class A forfeiture.

(b) Class B forfeiture.

(c) Class C forfeiture.

(d) Class D forfeiture.

(2) A forfeiture is a Class A, B, C or D forfeiture when it is so specified in chs. 939 to 948.

(3) Penalties for forfeitures are as follows:

(a) For a Class A forfeiture, a forfeiture not to exceed $10,000.

(b) For a Class B forfeiture, a forfeiture not to exceed $1,000.

(c) For a Class C forfeiture, a forfeiture not to exceed $500.

(d) For a Class D forfeiture, a forfeiture not to exceed $200.

940.201 ABUSE OF CHILDREN. Whoever tortures a child or subjects a child to cruel maltreatment, including, but not limited, to severe bruising, lacerations, fractured bones, burns, internal injuries or any injury constituting great bodily harm under s. 939.22 (14), is guilty of a Class E felony. In this section, "child" means a person under 16 years of age.

940.203 SEXUAL EXPLOITATION OF CHILDREN. (1) No person may knowingly employ, use, persuade, induce, entice or coerce any child to engage in sexually explicit conduct for the purpose of photographing, filming, videotaping, recording the sounds of or displaying in any way the conduct.

(2) No person may photograph, film, videotape, record the sounds of or display in any way a child engaged in sexually explicit conduct.

(3) No parent, legal guardian or other person exercising temporary or permanent control of a child may knowingly permit, allow or encourage the child to engage in sexually explicit conduct which is filmed, photographed, videotaped, recorded for sound or displayed in any way.

(4) No person may knowingly produce, perform in, profit from, promote, import, reproduce, advertise, sell, distribute, or possess with intent to sell or distribute, any undeveloped film, photographic negative, photograph, motion picture, videotape, sound recording or other reproduction of a child engaging in sexually explicit conduct.

(5) Whoever violates this section is guilty of a Class C felony.

(6) In this section:

(a) "Child" means any person under the age of 18 years.

(b) "Sexually explicit conduct" means actual or simulated:

1. Sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex;

2. Bestiality;

3. Masturbation;

4. Sexual sadism or sexual masochistic abuse, including but not limited to, flagellation, torture or bondage; or

5. Lewd exhibition of the genitals or pubic area of any person.

940.225 SEXUAL ASSAULT. (1) FIRST DEGREE SEXUAL ASSAULT. Whoever does any of the following is guilty of a Class B felony:

(a) Has sexual contact or sexual intercourse with another person without consent of that person and causes pregnancy or great bodily harm to that person.

(b) Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a dangerous weapon.

(c) Is aided or abetted by one or more other persons and has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence.

(d) Has sexual contact or sexual intercourse with a person 12 years of age or younger.

(2) SECOND DEGREE SEXUAL ASSAULT. Whoever does any of the following is guilty of a Class C felony:

(a) Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence.

(b) Has sexual contact or sexual intercourse with another person without consent of that person and causes injury, illness, disease or impairment of a sexual or reproductive organ, or mental anguish requiring psychiatric care for the victim.

(c) Has sexual contact or sexual intercourse with a person who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person's conduct, and the defendant knows of such condition.

(d) Has sexual contact or sexual intercourse with a person who the defendant knows is unconscious.

(e) Has sexual contact or sexual intercourse with a person who is over the age of 12 years and under the age of 16 years.

(3) THIRD DEGREE SEXUAL ASSAULT. Whoever has sexual intercourse with a person without the consent of that person is guilty of a Class D felony.

(3m) FOURTH DEGREE SEXUAL ASSAULT. Whoever has sexual contact with a person without the consent of that person is guilty of a Class A misdemeanor.

(4) CONSENT. "Consent", as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (1) (d) and (2) (c), (d) and (e). The following persons are presumed incapable of consent

but the presumption may be rebutted by competent evidence, subject to the provisions of s. 972.11 (2):

(b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.

(c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

(5) DEFINITIONS. In this section:

(a) "Sexual contact" means any intentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is either for the purpose of sexually degrading; or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant or if the touching contains the elements of actual or attempted battery under s. 940.19 (1).

(b) "Sexual intercourse" includes the meaning assigned under s. 939.22 (36) as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by the defendant or upon the defendant's instruction. The emission of semen is not required.

(6) MARRIAGE NOT A BAR TO PROSECUTION. A defendant shall not be presumed to be incapable of violating this section because of marriage to the complainant.

(7) DEATH OF VICTIM. This section applies whether a victim is dead or alive at the time of the sexual contact or sexual intercourse.

950.055 CHILD VICTIMS AND WITNESSES; RIGHTS AND SERVICES. (1) LEGISLATIVE INTENT. The legislature finds that it is necessary to provide child victims and witnesses with additional consideration and different treatment than that usually afforded to adults. The legislature intends, in this section, to provide these children with additional rights and protections during their involvement with the criminal justice or juvenile justice system. The legislature urges the news media to use restraint in revealing the identity of child victims or witnesses, especially in sensitive cases.

(2) ADDITIONAL SERVICES. In addition to all rights afforded to victims and witnesses under s. 950.04 and services provided under s. 950.05, counties are encouraged to provide the following additional services on behalf of children who are involved in criminal or delinquency proceedings as victims or witnesses:

(a) Explanations, in language understood by the child, of all legal proceedings in which the child will be involved.

(b) Advice to the judge, when appropriate and as a friend of the court, regarding the child's ability to understand proceedings and questions. The services may include providing assistance in determinations concerning the taking of videotaped depositions under s. 908.08 or 967.04 (7) and (8) and the duty to expedite proceedings under s. 971.105.

(c) Advice to the district attorney concerning the ability of a child witness to cooperate with the prosecution and the potential effects of the proceedings on the child.

(d) Information about and referrals to appropriate social services programs to assist the child and the child's family in coping with the emotional impact of the crime and the subsequent proceedings in which the child is involved.

(3) PROGRAM RESPONSIBILITY. In each county, the county board is responsible for the enforcement of rights and the provision of services under this section. A county may seek reimbursement for services provided under this section as part of its program plan submitted to the department under s. 950.06. To the extent possible, counties shall utilize volunteers and existing public resources for the provision of these services.

972.16 CHILD ABUSE: COMMITMENT FOR PRESENTENCE EXAMINATION. (1) If a person is convicted under s. 940.201, the court may commit the person to the department of health and social services for a presentence social and psychological examination. If the person is so committed, the court and all public officials shall make available to the department upon its request all data in their possession in respect to the case.

(2) If the court commits a person to the department under sub. (1) for presentence examination, the court shall order the person conveyed by

the proper county authorities at county expense to some place of detention or examination approved or established by the department.

(3) Upon completion of the examination, but not later than 60 days after the date of the commitment order, a report of the results of the examination and the recommendations of the department shall be sent to the court.

(4) Commitments to the department under this section for presentence examination are terminated when the court orders the person returned to court by the proper county authorities and the department gives custody of the person to the authorities or when following receipt by the court of the department's report and recommendations, the person is brought before the court for any reason; or when during the presentence examination the person absconds and the court issues an arrest warrant.

(5) The court shall consider the findings and recommendations of the department in imposing sentence upon the person.